



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Richard Doyle  
City Attorney

**SUBJECT:** Municipal Code Amendment  
Related to Grounds for  
Declaring a Public Nuisance

**DATE:** May 23, 2013

## RECOMMENDATION

Approve an ordinance amending Chapter 1.13 of Title 1 of the San José Municipal Code to amend Section 1.13.050 to clarify the definition of "public nuisance" to include non-payment of certain City business taxes and transient occupancy (hotel) taxes

## OUTCOME

The proposed ordinance would clarify the definition of "public nuisance" under the Municipal Code in order to better enable the City to seek injunctive relief from the courts to close the operation of businesses or hotels for failure to pay taxes that the Director of Finance has determined are owed to the City.

## BACKGROUND

The City Council gave this Office direction to draft an ordinance amending the Municipal Code in order to clarify the definition of "public nuisance" to include non-payment of certain City business taxes or the transient occupancy (hotel) taxes. The proposed ordinance complies with the City Council's direction.

## ANALYSIS

The City Council directed this Office to draft an ordinance amending the Municipal Code to clarify the City's ability to close a business for failure to pay the City's business taxes or transient occupancy (hotel) taxes. This Office previously advised that the basis for the City to seek closure of a business is that the operation of the business constitutes a public nuisance. Under State law, a public nuisance is the use or condition of private property that is "injurious to health" so as to affect the use of property by the community or a considerable number of persons.

The City has the authority under the State Government Code and the State Constitution to declare the type of conditions that constitute a public nuisance. The City has done so in Municipal Code Section 1.08.050(F) which provides that any violation of the Municipal Code constitutes a public nuisance:

Any condition existing in violation of any of the provisions of any state or federal law or regulation or of this Code or any other city ordinance shall be deemed a public nuisance and may be abated by the city. Nuisance shall include, but is not limited to, the factors in Section 1.13.050.

The factors listed in Section 1.13.050 are those that the courts historically have viewed as public nuisances, such as illegal drug and gambling activity and prostitution, among others.

The proposed ordinance expands the list of public nuisances in Section 1.13.050 to include the conduct of a business or the operation of a hotel on property in the City without paying to the City certain assessed taxes following the conclusion of the assessment process specified in the Municipal Code. The taxes specified in the proposed ordinance include the taxes where the business conducts a business or operates a hotel on real property in the City: (1) the general business tax under San José Municipal Code (SJMC) Chapter 4.76; (2) the marijuana business tax under SJMC Chapter 4.66; (3) the cardroom business tax under SJMC Chapter 4.77; and (4) the transient occupancy taxes under SJMC Chapters 4.72 and 4.74 that are imposed on hotel guests and collected and remitted to the City by hotel operators. Each of these SJMC chapters specifies a process for the Director of Finance to initiate collection of delinquent taxes through the issuance of assessment notice to the business or hotel operator and providing an opportunity for the business or hotel operator to appeal the assessment to the Director. Following conclusion of the administrative process, the City may pursue legal action for non-payment by the business or hotel operator. Typically, the City's legal action would be a collection action for the taxes owed.

This expansion of the public nuisance definition in the Municipal Code will provide the City with another tool, in addition to a collection action, to address delinquent payment of the City's business taxes and transient occupancy taxes. However, the ultimate decision on whether a business should be closed for non-payment of City taxes will be with the court and will depend on whether the court determines that the non-payment of the City's taxes in a particular case creates a condition that is injurious to the health of the community.

#### **PUBLIC OUTREACH/INTEREST**

This memorandum and the proposed ordinance have been posted on the City's website for the June 4, 2013 City Council agenda.

May 23, 2013

**Subject: Municipal Code Amendment related to Definition of a Public Nuisance**

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**COORDINATION**

This item has been coordinated with the Finance Department.

**CEQA**

Not a project; File No. PP10-068c, Municipal Code or Policy.

RICHARD DOYLE, City Attorney

By   
DANIELLE KENEALEY  
Chief Deputy City Attorney

cc: Debra Figone  
Julia H. Cooper

For questions please contact Danielle Kenealey, Chief Deputy City Attorney, at (408) 535-1916.